

A

TASJA SDN BHD

v.

GOLDEN APPROACH SDN BHD

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
[CIVIL APPEAL NO: 02(F)-2-2010(W)]
27 JANUARY 2011

C

CIVIL PROCEDURE: *Action - Striking out - Whether claim time-barred - Claim for payment under construction works contract - Whether defence of limitation must be pleaded - Whether limitation period to claim a monetary debt against a company may be postponed whilst company is under a winding up order - Rules of the High Court 1980, O. 18 r. 19 - Limitation Act 1953, ss. 4, 6*

D

E

CIVIL PROCEDURE: *Limitation of action - Contract - Limitation period - Claim for payment under construction works contract - Whether claim time barred - Whether defence of limitation must be pleaded - Whether limitation period to claim a monetary debt against a company may be postponed whilst company is under a winding up order - Limitation Act 1953, ss. 4, 6*

F

CIVIL PROCEDURE: *Pleadings - Limitation - Failure to plead limitation - Whether defence of limitation under Limitation Act 1953 must be pleaded*

G

LIMITATION: *Contract - Claim for payment under construction works contract - Whether claim time barred - Whether defence of limitation must be pleaded - Whether limitation period to claim a monetary debt against a company may be postponed whilst company is under a winding up order - Limitation Act 1953, ss. 4, 6*

H

I

The plaintiff was engaged by the defendant to undertake certain construction works pursuant to a construction contract. A firm of engineers was appointed as the consultant. Under the construction contract, the defendant had to pay to the plaintiff within 30 days after the consultant issued an interim valuation certificate certifying the work completed and the amount due. There were five such certificates dated 20 March 1997, 29 April 1997, 10 September 1997, 6 November 1997 and 12 February 1998 respectively. These claims were not paid by the defendant resulting in the

plaintiff having to stop work. The defendant was wound-up on 12 June 2000 and it was only in 2005 that the Court of Appeal allowed the defendant's appeal for a permanent stay of the winding up order. Thus, the plaintiff was only able to file this action on 31 May 2005 claiming a total sum of RM3,212,688.78. On 12 August 2005, after the plaintiff's statement of claim was served on the defendant, the defendant filed an application to strike out the plaintiff's claim under O. 18 r. 19(1)(b), (c) and (d) of the Rules of the High Court, 1980 ('RHC') on ground that the plaintiff's claim was statute-barred under s. 6(1)(a) of the Limitation Act, 1953 ('the Act'). The plaintiff contended that the defendant was not entitled to claim limitation since the defendant has not filed its defence pleading limitation as required by s. 4 of the Act. The High Court allowed the defendant's application and held that though s. 4 of the Act requires the defence of limitation to be pleaded this can be exempted in an application for striking out. The Court of Appeal dismissed the plaintiff's appeal. The plaintiff then obtained leave to appeal to the Federal Court, *inter alia*, on the following questions: (i) [Question 1] Whether a defence of limitation under s. 4 of the Act must be pleaded before a claim can be dismissed on the ground that it is time-barred; and (ii) [Question 5] Whether the limitation period to bring a civil claim against a company for monetary debt is postponed whilst the company is being wound up pursuant to a court order under the Companies Act 1965 (CA65).

Held (allowing the appeal with costs)

Per James Foong FCJ:

- (1) In an application for striking out under O. 18 r. 19(1) RHC on the ground of limitation to bring an action, a distinction must be made as to which provision of the law is used to ground such application. If it is based on s. 2(a) of Public Authority Protection Act 1948 or s. 7(5) of the Civil Law Act, where the period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence. However, in a situation where limitation is not absolute, like in a case under the Act, such application for striking out should not be allowed until and unless limitation is pleaded as required under s. 4 of the Act. The 1st question was thus answered in the positive. *Kuan Hip Peng v. Yap Yin & Anor* (dist); *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* (dist); *Tio Chee Hing & Ors v. Government of Sabah* (dist). (paras 25-28)

- A (2) Under s. 226(3) of the CA65, when a winding up order is made or a provisional liquidator appointed, no action or proceeding shall be proceeded with or commenced against the company except with leave of court and in accordance with such terms as the court imposes. But when a stay of the winding order is granted, it amounts to a total discontinuance or termination of the winding up proceedings. This may prejudice the plaintiff where limitation has set in after the granting of the order for stay. There is no provision of law to prevent such prejudice. There is no provision of law to permit the court to disregard time from running under the Act. The plaintiff should have instead applied for leave under s. 226(3) of the Companies Act 1965 to institute an action against the defendant rather than leaving it to a later date. Therefore, the 5th question was answered in the negative. (paras 35-39)
- B
- C
- D

Bahasa Malaysia Translation Of Headnotes

- E Plaintiff telah dilantik oleh defendan untuk melaksanakan kerja-kerja pembinaan berdasarkan suatu kontrak. Sebuah firma jurutera telah juga dilantik sebagai konsultan. Di bawah kontrak pembinaan, defendan perlu membayar plaintif dalam tempoh 30 hari selepas konsultan mengeluarkan sijil penilaian interim mengesahkan kerja telah disiapkan serta jumlah yang harus dibayar. Terdapat lima sijil sedemikian masing-masing bertarikh 20 Mac 1997, 29 April 1997, 10 September 1997, 6 November 1997 dan 12 Februari 1998.
- F Tuntutan-tuntutan ini tidak dibayar oleh defendan sekaligus menyebabkan plaintif memberhentikan kerja. Pada 12 Jun 2000 defendan telah digulung dan hanyalah pada tahun 2005 Mahkamah Rayuan membenarkan rayuan defendan untuk penggantungan kekal perintah penggulungan. Apapun, sebagai akibatnya, plaintif hanya dapat memfailkan tindakan semasa pada 31 Mei 2005 menuntut sejumlah RM3,212,688.78. Pada 12 Ogos 2005, selepas penyata tuntutan plaintif diserahkan kepada defendan, defendan memfailkan permohonan untuk membatalkan tuntutan plaintif di bawah A. 18 k. 19(1)(b), (c) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa tuntutan plaintif telah dihalang oleh statut di bawah s. 6 (1)(a) Akta Had Masa 1953 ('Akta'). Plaintif berhujah bahawa defendan tidak berhak untuk membangkitkan soal had masa oleh kerana defendan tidak memfailkan pembelaannya dan memplidkan had masa seperti yang dikehendaki oleh s. 4 Akta. Mahkamah Tinggi telah membenarkan permohonan defendan dan memutuskan bahawa walaupun s. 4 Akta mengkehendaki supaya pembelaan had masa diplidkan ianay boleh dikecualikan
- G
- H
- I

dalam suatu permohonan pembatalan. Rayuan plaintif telah ditolak oleh Mahkamah Rayuan. Plaintif kemudian memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan, antara lain atas persoalan-persoalan berikut: (i) [Soalan 1] sama ada pembelaan had masa di bawah s. 4 Akta wajib diplidkan sebelum sesuatu tuntutan itu boleh ditolak atas alasan ianya terhalang oleh had masa; (ii) [Soalan 5] sama ada tempoh had masa untuk membawa suatu tuntutan sivil terhadap sebuah syarikat kerana keberhutangan wang ditangguhkan sementara syarikat digulung ekoran satu perintah mahkamah di bawah Akta Syarikat 1965 ('Akta Syarikat').

Diputuskan (membenarkan rayuan dengan kos)

Oleh James Foong HMP menyampaikan penghakiman mahkamah:

- (1) Dalam satu permohonan pembatalan di bawah A. 18 k. 19(1) KMT atas alasan halangan had masa untuk membawa tindakan, perbezaan harus dibuat berkaitan peruntukan undang-undang yang manakah yang digunakan bagi mengasaskan permohonan sedemikian. Jika ianya diasaskan kepada s. 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 atau s. 7(5) Akta Undang-Undang Sivil 1956, di mana tempoh had masa adalah mutlak, maka dalam suatu kes yang nyata dan jelas permohonan sedemikian hendaklah dibenarkan tanpa perlu memplidkan pembelaan tersebut. Bagaimanapun, dalam keadaan di mana had masa tidak mutlak, seperti kes di bawah Akta, permohonan pembatalan sedemikian tidak harus dibenarkan selagi dan sehingga had masa diplidkan seperti yang dikehendaki oleh s. 4 Akta. Soalan pertama dengan itu adalah djawab secara positif. *Kuan Hip Peng v. Yap Yin & Anor.* (dibezakan); *Kerajaan Malaysia & Ors. v. Lay Kee Tee & Ors.* (dibezakan); *Tio Chee Hing & Ors. v. Government of Sabah* (dibezakan)
- (2) Di bawah s. 226(3) Akta Syarikat, bilamana suatu perintah penggulungan dibuat atau pelikuidasi sementara dilantik, tiada tindakan atau prosiding boleh diambil atau diteruskan terhadap syarikat kecuali dengan izin mahkamah dan berdasarkan terma-terma yang ditetapkan oleh mahkamah. Tetapi, apabila penggantungan terhadap perintah penggulungan dibenarkan, maka ia menjadi pemberhentian atau penamatan sepenuhnya prosiding penggulungan. Ini mungkin memprejudiskan plaintif di mana had masa telah berbangkit selepas perintah penggantungan dibenarkan. Tiada peruntukan undang-undang yang menghalang prejudis sedemikian. Juga tiada peruntukan

- A undang-undang yang membenarkan mahkamah untuk tidak mengendahkan masa dari berjalan di bawah Akta. Plaintiff sepatutnya memohon kebenaran di bawah s. 226(3) Akta Syarikat bagi memulakan tindakan terhadap defendan dan tidak membiarkannya ke suatu tarikh kemudian. Oleh itu, soalan
- B kelima adalah dijawab secara negatif.

Case(s) referred to:

- BSN Commercial Bank (Malaysia) Bhd v. River View Properties Sdn Bhd And Another Action* [1996] 1 LNS 63 HC (*refd*)
- Commonwealth of Australia v. Mezwett* [1995] 59 FCR 391 (*refd*)
- C *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC (*refd*)
- In Re Donald Kenyon* [1956] 1 WLR 1397 (*refd*)
- In Re General Rolling Stock Company* [1872] 7 Ch App 646 (*refd*)
- KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169 FC (*refd*)
- D *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 FC (*refd*)
- Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689 (*refd*)
- Kuan Hip Peng v. Yap Yin & Anor* [1964] 1 LNS 69 FC (*refd*)
- OCBC Ltd v. Philip Wee Kee Puan* [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 PC (*refd*)
- E *Re Chop Cheong Tuck of Ipoh* [1938] FMSLR 19 (*refd*)
- Re Delta Homes Pty Ltd* [1972] 2 NSWLR 22 (*refd*)
- Re South Barrule Slate Quarry Co* [1969] LR 8 Eq 688 (*refd*)
- Ting Yuk Kiong v. Mazwar Biru Sdn Bhd & Anor* [1995] 3 CLJ 136 HC (*refd*)
- F *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 2 CLJ 392 CA (*refd*)

Legislation referred to:

- Civil Law Act 1956, s. 7(5)
- Companies Act 1965, ss. 226(3)(a), 243(2)
- G Limitation Act 1953, ss. 4, 6(1)(a), 26(2)
- Public Authorities Protection Act 1948, s. 2(1)(a)
- Rules of High Court 1980, O. 18 rr. 19(1)(b), (c), (d)
- Companies Act 1862 [UK], s. 98

H Other source(s) referred to:

- McPherson, *The Law of Company Liquidation*, 4th edn, p 657
- For the appellant - Ambiga Sreenevasan (Gobind Singh Deo, Robyn Choy, Marisa Regina with her); M/s Aris Rizal Christopher Fernando & Co M/s Sreenevasan*
- I *For the respondent - Wong Kian Kheong (Low Eu Thuan, Karen Lee Foong Voon with him); M/s Cheong Wai Meng & Van Buerle M/s Wong Kian Kheong*

Reported by Amutha Suppayah

JUDGMENT**A****James Foong FCJ:****Introduction**

[1] This appeal involves the striking out of the plaintiff's action under O. 18 r. 19(1)(b), (c) and (d) of the Rules of High Court (RHC) on the ground that it was instituted after the limitation period stipulated by the Limitation Act 1953 (Limitation Act).

B**Background****C**

[2] The pleaded case of the plaintiff is basically this. The plaintiff was engaged by the defendant to undertake certain construction works in a particular project. This appointment was in writing which we shall refer to as the "construction contract". Under this contract, a firm of engineers was appointed as the consultant. It is a term in this construction contract that the defendant would have to pay to the plaintiff within 30 days after the consultant has issued to the plaintiff an interim valuation certificate certifying the work completed and the amount due. There were five such certificates dated 20 March 1997, 29 April 1997, 10 September 1997, 6 November 1997 and 12 February 1998 respectively amounting RM1,316,783.76. The plaintiff claims that this was not paid and gave the following particulars in its statement of claim:

D**E**

Value of approved works:	RM 3,795,241.85
Value of materials on site:	RM 82,802.54
Variation:	RM 202,458.37
Total paid:	RM 1,726,300.00
Deduct land value: RM1,037,419	<u>RM 2,763,719.00</u>

F**G**

RM 1,316,783.76

[3] The plaintiff alleged that the defendant had admitted to the amount outstanding in a letter dated 24 March 1998, but due to financial constraint was unable to satisfy this debt resulting in the plaintiff having to stop work.

H

[4] The statement of claim then proceeded to say that due to the defendant's breach of contract and the defendant's declaration of its financial predicament they were finally forced to stop work on the project and on 7 August 1998 forwarded to the defendant another claim for RM1,895,905.02. Particulars of this are as follows:

I

A	Value of work done to project:	RM6,222,983.26
	Value of materials supplied:	RM 249,956.77
	Variation:	RM 214,854.99
		RM6,687,805.02
B	Total amount as certified:	<u>RM4,791,900.00</u>
	Balance:	<u>RM1,895,905.02</u>

C [5] In para. 11 of the statement of claim, the plaintiff asserted that the defendant was wound-up on 12 June 2000 and it was only in 2005 that the Court of Appeal allowed the defendant's appeal for a permanent stay of the winding up order. For this reason the plaintiff was only able to file this action on 31 May 2005 claiming a total sum of RM3,212,688.78 with interest and costs.

D [6] On 12 August 2005, after the plaintiff's statement of claim was served on the defendant, the defendant filed an application by way of summons-in-chamber to strike out the plaintiff's claim under O. 18 r. 19(1)(b), (c) and (d) RHC on ground that the plaintiff's claim is statute barred under s. 6(1)(a) of the Limitation Act.

E [7] The plaintiff in its affidavits opposing the application disclosed that subsequent to the non-payment following the issuance of the interim valuation certificates, the parties entered into a written agreement terminating the construction contract. We shall refer to this agreement as the "termination agreement". It provides *inter alia* for the plaintiff's completed works on the project to be inspected and assessed within a specific time and the amount due shall be settled by the defendant by way of monthly installments of RM100,000 each commencing from 1 February 1998. There is also a provision for the defendant to contra part of the outstanding amount by transferring to the plaintiff, certain number of the defendant's bungalow lots in the project valued at RM1 million. Though there were certain payments made by the defendant and that the bungalow lots were transferred to the plaintiff, they only occurred in 1988. Further, since the defendant had renegaded on certain installment payments, this action was brought. As for this application, the plaintiff asserted that the defendant is not entitled to claim limitation since the defendant has not filed its defence pleading limitation as required by s. 4 of the Limitation Act.

[8] The High Court allowed the defendant's application principally on the ground that the plaintiff's claim is statute-barred since it is based on the non-payment of the interim valuation certificates and the plaintiff's letter dated 7 August 1998 terminating the construction contract and not on the termination agreement. Though s. 4 of the Limitation Act requires the defence of limitation to be pleaded this can be exempted in an application for striking out. In support, the case of *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 was cited.

[9] Dissatisfied with this decision, the plaintiff appealed to the Court of Appeal. The Court of Appeal in dismissing the plaintiff's appeal supported much of what was stated by the High Court particularly in rejecting the plaintiff's explanation contained in its affidavits about the termination agreement. The Court of Appeal held that these assertions contained in the plaintiff's affidavits are not the pleaded case of the plaintiff and therefore cannot be taken into consideration and neither can they be accepted as an amendment to the plaintiff's statement of claim.

[10] With regard to the requirement to plead the defence of limitation under s. 4 of the Limitation Act before it can be applied, the Court of Appeal has this to say:

We agree with the submission of the learned counsel for the defence that the provision was not relevant for the purpose of the defendant's application as the defendant was applying to strike out the plaintiff's claim under O. 18 r. 19 Rules of High Court as such the defendant did not have to file its defence at that stage (see *Kuan Hip Peng v. Yap Yin & Anor* [1964] 1 LNS 69; [1965] 3 MLJ 252.)

[11] Aside from this, the case of *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors* (*supra*) was also cited in support of this proposition.

[12] Regrettably, the Court of Appeal did not touch on the plaintiff's handicap in not being able to bring this action against the defendant due to the winding up order made against the defendant.

Questions Posed

[13] Five questions were posed to us. They are:

- A 1. Whether a defence of limitation under s. 4 of the Limitation Act 1953 must be pleaded before a claim can be dismissed on the ground that it is time-barred.
- B 2. Whether defence of limitation under s. 4 of the Limitation Act 1953 must be pleaded before a court may consider the said defence in a case where a claim is made based on a settlement agreement wherein limitation commences upon breach of a condition in the settlement agreement.
- C 3. Whether a judge should consider evidence adduced through affidavits showing that an action is not barred by limitation where an application is made to strike out under O. 18 r. 19(1) Rules of High Court 1980 where no defence has been filed.
- D 4. Whether the decision in the case of *Overseas-Chinese Banking Corporation Ltd v. Philip Wee Kee Puan* [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 and *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169 which are Privy Council and Federal Court decisions that decided the failure to plead “acknowledgment of debt” as a basis of claim in the statement of claim did not affect the claim and still exist as good and binding law.
- E 5. Whether the limitation period to bring a civil claim against a company for monetary debt is postponed whilst the company is being wound up pursuant to a court order under the Companies Act 1965.
- F

Questions 1: Whether The Defence Of Limitation Under s. 4 Of The Limitation Act 1953 Must Be Pleaded Before A Claim Can Be Dismissed On The Ground That It Is Time-barred

- G [14] We shall start by setting out s. 4 of the Limitation Act:

Limitation not to operate as a bar unless specially pleaded (4)
Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

- H
- I [15] It is trite as early as 1938 (see *Re Chop Cheong Tuck of Ipoh* [1938] FMSLR 19) that unless limitation is pleaded as a defence, it shall not operate as a bar to an action. One of the rationales for this is that the defendant may elect to waive this as a defence – see *Commonwealth of Australia v. Mewett* [1995] 59 FCR 391. Such waiver by the defendant will entitle the plaintiff to proceed with his claim even though time as provided by the statute has

run against him. The other reason is that this defence of limitation is not absolute. There are exceptions provided under the Limitation Act. So unless it is expressly pleaded by the defendant, the plaintiff may not be able to set out his grounds to justify the exemption.

A

[16] Though this is the law but in a situation where the defendant applies to strike out the plaintiff's claim under O. 18 r. 19(1) RHC before a defence is filed on the grounds that the claim is statute barred, can such an application be entertained? Both the High Court and the Court of Appeal have answered this in the positive and cited various cases in support. These cases have allowed striking out the plaintiff's claim on the grounds that limitation has set in even though defence has yet to be filed containing such a plea. Briefly stated, they have ruled that it is not necessary in an application for striking out based on limitation to comply with s. 4 of the Limitation Act. For this reason, it is necessary for us to examine the cases cited.

B

C

D

[17] The first is *Hj Hussin Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165. In this case, 157 persons claiming to be Penghulus of Kampong filed a suit against the Menteri Besar, the State Secretary and the State Government of Kelantan opposing their dismissal from their positions as Penghulus and sought reinstatement. The defendants did not file a defence but instead applied under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the plaintiffs' claim on the grounds that: (a) it discloses no reasonable cause of action; (b) it is frivolous, vexatious, irregular, null and void, and (c) it is otherwise an abuse of the process of court. In the affidavit in support of this application, the Legal Adviser of Kelantan, counsel for the defendants, averred that since the acts of dismissing these Penghulus of Kampong were done in the execution of their public duties in accordance with the authority provided by the relevant regulations and since all the plaintiffs had filed their respective actions too late they were statute barred by s. 2(a) of the Public Authorities Protection Act 1948. But the plaintiffs argued that limitation had to be pleaded. Towards this, the Federal Court declared:

E

F

G

H

We need not go further than to refer to the judgment of this Court in *Tio Chee Hing & Ors v. Government of Sabah* [1980] 1 LNS 124; [1981] 1 MLJ 207 where this Court referred to the Court of Appeal decision in *Riches v. Director of Public Prosecutions* [1973] 2 All ER 935 which decided that where it is clear that the

I

A defendant was going to rely on the statute of limitations and there was nothing before the Court to suggest that the plaintiffs could escape from it, the claim would be struck out. An extract from the judgment of Davies LJ at p. 939 is relevant:

B In the light of those more recent authorities I think, as I say, that perhaps the observations of this Court in *Dismore v. Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the Statement of Claim discloses no cause of action, the limitation objection should or would prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

That indeed was the answer of the learned Legal Adviser. We agree with him.

E [18] In a more recent decision of this court *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, a similar ruling was made in support of exempting the requirement to file a defence of limitation in an application to strike out the plaintiff's claim under O. 18 r. 19(1) RHC. After citing *Tio Chee Hing & Ors v. Government of Sabah (supra)*, this court went on to say:

G Likewise, in the present action, it was clear that the appellants were going to rely on limitation and there was no way that the respondents could have escaped from it. Thus, a defendant on an application to strike out pleadings and endorsements under O. 18 r. 19(1) of the RHC is entitled to raise limitation of action without pleading a defence and filing it to that effect. Similarly, in the present case, the appellants were entitled to do the same, and since the respondents' action was clearly statute-barred, the action was therefore properly struck out.

H [19] But it was argued before us that the defences in these two cases were under, the Public Authorities Protection Act 1948 (PAPA) which has a provision that differs from that of s. 4 of the Limitation Act. Section 2(a) of PAPA states:

I

Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect – (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

A

B

[20] It was also pointed out to us by the plaintiff's counsel that an almost similar provision (as s. 2 of PAPA) exists in s. 7(5) of Civil Law Act which says:

C

- (5) Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased.

D

[21] This, according to Dato' Ambiga, counsel for the plaintiff, creates a distinction between a limitation that is conditional and one which is absolute. She then stressed that in both s. 2(1) of PAPA and s. 7(5) of the Civil Law Act, the respective limitation period stated therein is absolute and therefore it is reasonable in application where limitation is used as ground for striking out to waive this plea but, not in a claim for limitation under the Limitation Act which is not absolute.

E

F

[22] We are of the view that this submission is best explained in the Federal Court case of *Kuan Hip Peng v. Yap Yin & Anor* [1964] 1 LNS 69.

G

[23] The facts of this case are these: The plaintiff an infant was suing by his friend under s. 7 of the Civil Law Act claiming compensation for the death of his father due to a motor accident caused by the 2nd defendant while driving a motor vehicle belonging to the 1st defendant. Before defence was filed, the defendants took out an application to strike out the plaintiff's claim for being frivolous and vexatious and an abuse of the courts process since it was not brought within three years of the deceased's death. The High Court allowed the application for striking out and this was affirmed by the Federal Court on appeal. The rationale for this is as follows:

H

I

- A [24] Generally, one cannot strike out a claim without pleading limitation for reason that the plaintiff may be able to show that he is entitled to bring the action notwithstanding the limitation period has set in by reason of one of the exceptions set out in the Limitation Act. The statute of limitation is not absolute. With
- B the exceptions, there may be situation where limitation would otherwise apply. And until the statute is pleaded there is no opportunity for the plaintiff to raise this point. But then Federal Court proceeded to say:
- C But that is not the position in the present case. The terms of section 7(5) of the Civil Law Ordinance are absolute and contain no exceptions. They are that “such action shall be brought within three years after the death of the deceased person”. It is true that, as Goddard LJ, said with reference to the corresponding section of the English Act, the section “merely prescribes a period of Limitation” (*Lubovsky v. Snelling*) and that it does not contain a condition precedent or anything of the sort. Nevertheless the
- D period is absolute. There is no room for doubt as to when it begins to run. It runs from the death of the person of whose support the plaintiff has been deprived. The cause of action arises on death (see *Seward v. “Vera Cruz”*). There are none of the
- E saving provisions in favour of a plaintiff that were found in the Statute of James I and are to be found today in the English Limitation Act of 1939 or our own Limitation Ordinance of 1953. There is no question of infancy or disability or anything of the sort or of acknowledgment. The only way in which the
- F consequences of the section could be avoided would be if there had been some agreement not to plead the statute and this would constitute a new cause of action (*Lubovsky v. Snelling, supra*) and would require to be set out in the statement of claim.
- G Finally there can be no question of importing into the matter any of the saving provisions of the Limitation Ordinance by any process of construction for by section 3 of that Ordinance it “shall not apply to any action ... for which a period of limitation is prescribed by any other written law.”
- H It is true that an application such as was made in the present case must be most carefully scrutinized and the powers of the court under Order 25 rule 4 must be exercised with the greatest care. As was said by Lindley LJ in the case of *Kellaway v. Bury*:
- I That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt. It is not because the statement of claim is demurrable from a pleader’s point of view that the court is justified in stamping the action out. It must be only be demurrable, but the

court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendment.

A

Nevertheless in my view the present case was a proper case for the exercise of these powers. Counsel has suggested no ground on which the consequences of limitation could be avoided. I trust it is not unkind to suppose that what his argument amounted to was that he was entitled to time to think of something. For myself I have been able to think of nothing and can see no grounds for supporting any prolongation of counsels' intellectual labours would produce more substantial result.

B

C

I would dismiss the appeal with costs.

[25] After scrutinizing the authorities above we agree with the submission of the plaintiff that in an application for striking out under O. 18 r. 19(1) RHC on the ground of limitation to bring an action, a distinction must be made as to which provision of the law is used to ground such application. If it is based on s. 2(a) of PAPA or s. 7(5) of the Civil Law Act, where the period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence. However, in a situation where limitation is not absolute, like in a case under the Limitation Act, such application for striking out should not be allowed until and unless limitation is pleaded as required under s. 4 of the Limitation Act. Our reasons are these:

D

E

F

[26] Section 4 of the Limitation Act is explicit when it declares that "nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded ...". This phrase is clear and unambiguous. It demands the defendant to expressly state this as a defence before it can become effective. This differs from s. 2(a) of PAPA which said that no suit, action, prosecution or proceeding "shall not lie or be instituted unless" it is commenced within a certain specified time. The same applies to s. 7(5) of the Civil Law Act which says "such action shall be brought within three years after the death of the deceased's person". This is absolute and as Thomson LP in *Kuan Hip Peng v. Yap Yin & Anor (supra)* said it "gives no room for doubt as to when it begins to run". And on top of this there are exceptions provided in the Limitation Act as well as the option for the defendant to waive this defence. These are absent in both the PAPA and the Civil Law Act. Thus, to allow a defendant's application to strike out the plaintiff's case even before such events have occurred and deprive the plaintiff an opportunity to explain why limitation does

G

H

I

- A not apply would cause injustice to the plaintiff. Further, it is against the express provision of the law (s. 4 of the Limitation Act) which requires a defence of limitation to be pleaded before it can be effected. When such a defence of limitation under the Limitation Act is not absolute and is required by law to be
- B pleaded before it can be considered, then a defendant's application for striking based on this Act should not be allowed.

- [27] We must stress that we are not departing from the previous decisions decided by this court. The case of *Kuan Hip Peng v. Yap Yin & Anor (supra)* is distinguished on the ground that the striking out application was based on an absolute limitation of s. 7(5) of the Civil Act. And in the *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors (supra)* and *Tio Chee Hing & Ors v. Government of Sabah (supra)*, both were based on the limitation set out in PAPA. In
- C those types of cases, striking out without the need to plead limitation can be entertained but not, and we repeat, not in a situation where limitation is grounded on the Limitation Act.
- D

- [28] Our answer to the 1st question posed is therefore in the positive.
- E

- Question 2: Whether Defence Of Limitation Under s. 4 Of The Limitation Act 1953 Must Be Pleaded Before A Court May Consider The Said Defence In A Case Where A Claim Is Made Based On A Settlement Agreement Wherein Limitation Commences Upon Breach Of*
- F *A Condition In The Settlement Agreement*

- [29] This 2nd question is based on the assumption that the plaintiff has pleaded in his statement of claim the termination agreement. But as found by the High Court, this is not the
- G pleaded case of the plaintiff. The plaintiff's claim is grounded on the construction contract. For this reason, we cannot answer this question against the finding of the trial judge on an issue much contested by the defendant.

- Question 3: Whether A Judge Should Consider Evidence Adduced Through Affidavits Showing That An Action Is Not Barred By Limitation Where An Application Is Made To Strike Out Under O. 18 r. 19(1) Rules Of High Court 1980 Where No Defence Has Been Filed*
- H

- [30] Since we have answered question 1 in the positive and differentiated the treatment to be applied when considering statutory limitation as a ground for striking out, this 3rd question is academic in the circumstances of this case. As such, it does not warrant us to answer it.
- I

Question 4: Whether The Decision In The Case Of OCBC Ltd v. Philip Wee Kee Puan [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 And KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 Which Are Privy Council And Federal Court Decisions That Decided The Failure To Plead "Acknowledgment Of Debt" As A Basis Of Claim In The Statement Of Claim Still Exist As Good And Binding Law

A

B

[31] We are of the view that this 4th question is premised on the likelihood that the defendant's application to strike out the plaintiff's claim on the grounds of limitation without the need to initially plead it as defence is successful, prompting the plaintiff to raise the acknowledgment of debt as an exception to overcome this bar.

C

[32] Once again this issue is academic. Unless the defendant has raised the defence of limitation in their pleading there is no necessity for the plaintiff to provide any explanation as to why such limitation is not applicable. As we have expressed earlier, the defence of limitation under the Limitation Act is not absolute. The defendant may choose to waive it. And if it is pleaded, the plaintiff can raise the acknowledgment of a debt under s. 26(2) of the Limitation Act as an exemption. For this reason we choose not to answer this question.

D

E

Question 5: Whether The Limitation Period To Bring A Civil Claim Against A Company For Monetary Debt Is Postponed Whilst The Company Is Being Wound Up Pursuant To A Court Order Under The Companies Act 1965

F

[33] It is the contention of the plaintiff that the delay in filing this action against the defendant was due to the winding up order made against the defendant on 12 June 2000. This disability caused by the winding up order continued until a permanent stay was allowed on 8 July 2002. With a winding up order, the plaintiff's right as a creditor was restricted to filing a proof of debt and the right to file a suit against the company could only be possible with leave of the court. And when the winding up order was stayed, which was years later and before the liquidator has distributed any payment to creditors out of the assets of the defendant, the plaintiff found its action could be statute barred. This has prejudiced the plaintiff. In support, a passage from the judgment of Melish LJ *In Re General Rolling Stock Company* [1872] 7 Ch App 646 was cited:

G

H

I

- A In these cases the rule is that everybody who had a subsisting claim at the time of adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against the claim, but, as long as assets remain unadministered he is at liberty to come in and
- B prove his claim, not disturbing any former dividend.
- [34] Further, according to Dato' Ambiga, unless time for the purpose of limitation under the Limitation Act is stopped or postponed, there is nothing to prevent a company from taking advantage of being wound up for the purpose of defeating its
- C creditors with limitation and subsequently applying for a stay after this objective is achieved.
- [35] Undeniably, under s. 226(3) of the Companies Act 1965 (Companies Act), when a winding up order is made or a provisional liquidator appointed, no action or proceeding shall be proceeded with or commenced against the company except with leave of court and in accordance with such terms as the court imposes. Creditors of the company would have to file proof of
- D debt with the appointed liquidator and if their debt is proved, they would be paid depending on the sufficiency of funds in the wound up company. But when a stay of the winding order is granted, it amounts to a total discontinuance or termination of the winding up proceedings (unless with terms) – see *Vijayalakshmi Devi*
- E *Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 2 CLJ 392 and *BSN Commercial Bank (Malaysia) Bhd v. River View Properties Sdn Bhd And Another Action* [1996] 1 LNS 63. And in the words of the author in '*McPherson The Law of Company Liquidation*' 4th edn at p. 657, it is like "the winding up process comes to an end-
- F the whole effect of the winding up ceases and the company can thereupon resumes conduct of its business and affairs as if no winding up existed". This may prejudice the plaintiff since limitation has set in after the granting of the order for stay and when the liquidator had not settled any company's debts before the stay.
- G But the question is by what provision of the law can it be prevented?
- H
- [36] In our opinion there is no provision of the law to allow us to do so; neither in the Limitation Act nor the Companies Act. In such a situation the protection offered to creditors who were
- I not paid by the liquidator is to voice their concern during the application for a stay of the winding up order.

Under s. 243(2) of the Companies Act, various factors are required to be considered by the court at such hearing wherein the court may “require the liquidator to furnish a report with respect to any facts or matters which are in his opinion is relevant”. This report would contain information on whether creditors are paid or settled. This is vital particularly when a winding up order was initiated on a creditor’s petition - see *Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689, 694 and *Re Delta Homes Pty Ltd* [1972] 2 NSWLR 22, 26. And creditors have to be informed of such an application – see *Re South Barrule Slate Quarry Co* [1969] LR 8 Eq 688 followed in *Ting Yuk Kiong v. Mawar Biru Sdn Bhd* [1995] 3 CLJ 136. If any of them is dissatisfied with such an application, he can oppose it and give his view or demand his debt (particularly if it is proved before the liquidator) to be first paid as a condition for stay. And since the final decision of whether to grant or refuse such an application rests with the court, the court can set terms and conditions in the stay order. Another option open to the creditor is to seek leave from the court under s. 226(3)(a) of the Companies Act to determine the issue of liability between him and the wound up company. Support for this is found in *Re General Rolling Stock Company (supra)* where James LJ said:

After a winding up order has been made, no action is to be brought by a creditor except by the special leave of the Court, and it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations. It must have been intended that such leave should be given only in cases where the Court thought that an action was the most proper means of determining the question of the liability of the company.

[37] Before we depart from this issue, we would like to comment on the two cases, one of which was cited by the plaintiff in support of its argument. The first is *In Re Donald Kenyon* [1956] 1 WLR 1397, 1401 where Roxburgh J said:

and it seems to me that, when a company has been dissolved and therefore nobody can sue it without getting it restored to the register, it is only common fairness that, if the contributories for the purposes of their own, want to get it restored to the register years afterwards, the period between the dissolution and the restoration to the register should be disregarded for the purposes of the Statute of Limitation.

- A [38] If one were to examine the facts of this case, this statement was made at the stage when the application for stay of the winding up order or such like was made; not as a general proposition for disregarding the period of limitation from time of the winding up order to the stay of such order in an action for
B monetary debt.

- [39] The other case is *In Re General Stock Discount Company (supra)* where we have disclosed the statement made by Mellish LJ earlier. This is not a case where the limitation period should
C be disregarded between the time of the winding up order to the time when the stay of such order was granted for the purpose of bringing an action against the company. It concerns the late filing of a proof of debt by a creditor to the liquidator which was made out of time. The rationale given here is that since the company
D has assets and there being no other creditors prejudiced, limitation should be waived. Much of what was decided is based on s. 98 of the English Companies Act of 1862 which provides: "As soon as may be after the making an order for winding up the company, the court shall settle a list of contributors, with power to rectify
E the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities". But here we are not talking about whether there are excess funds in the company but rather about the issue of liability.
F On this issue there is no provision of law to permit us to disregard time from running under the Limitation Act. In fact, on such a matter, as discussed, the plaintiff should have applied for leave under s. 226(3) of the Companies Act to institute an action against the defendant rather than leaving it to a later date. For
G this reason, we answer this 5th question in the negative.

Conclusion

- [40] In view of our reasoning we allow this appeal with costs here and below. The orders of the High Court and Court of
H Appeal are set aside. The case be remitted to the High Court.